United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

[redacted]688

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,232

THOMAS H. WASHINGTON, JR.,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT

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JURISDICTIONAL STATEMENT

This is an appeal from a judgment and commitment of the United States District Court for the District of Columbia entered on April 25, 1966. On this date the appellant was convicted of rape, robbery, and assault with a deadly weapon, 22 D.C. 2801, 2901, 502 upon his plea of not guilty and a verdict of guilty. On May 9, 1966, Judge Matthews granted appellant's motion to proceed in his appeal without prepayment of costs pursuant to 28 U.S.C. 1915.

The Court has jurisdiction to hear this appeal under 28 U.S.C. 1291, 1294 and Rule 41 (a) of this Court.

STATEMENT OF THE CASE

Appellant was placed under arrest in the District of Columbia at approximately 3:40 a.m., August 9, 1965. On August 23, 1965, the Grand Jury returned a true bill charging that on or about August 9, 1965, appellant within the District of Columbia had carnal knowledge of a female named Gladys Harrell, forcibly and against her will; and that appellant by force and violence stole and took from her person and immediate possession, $24.00 in money; and that appellant made an assault on Gladys Harrell with a dangerous weapon, that is, a knife.

On September 3, 1965, appellant entered a plea as to each of these counts of "Not Guilty."

Appellant's court appointed counsel below on September 23, 1965, filed an affidavit raising questions about the sanity of his client. On that same day, the District Court for the District of Columbia issued an order granting appellant's motion for a mental examination and committed appellant to St. Elizabeth's Hospital for a period of 60 days. A report was issued by St. Elizabeth's Hospital on November 23, 1965, stating that appellant was competent to stand trial.

On January 21, 1966, appellant's court appointed counsel below moved the District Court for the District of Columbia for an order permitting appellant to be screened and examined by the psychiatrists attached to the Legal Psychiatric Service. On January 28, 1966, the Court issued an order denying appellant's motion.

On February 16, 17, and 18, 1966, appellant was tried in the District Court for the District of Columbia, and on February 18, 1966, the jury returned a verdict of "Guilty" as to each of the counts charged in the indictment.

On April 25, 1966, appellant filed in the District Court of the District of Columbia a motion for leave to appeal in forma pauperis, which motion was on May 11, 1966, granted.

QUESTIONS PRESENTED

I - Did the trial court commit reversible error in its failure to direct a verdict for appellant of "Not guilty by reason of insanity"?

II - Did the trial court's comment on only that portion of the testimony of the Government's physicians which was unfavorable to the appellant prevent an impartial consideration of this testimony by jury, resulting in a denial to appellant of a fair trial as required by the Sixth Amendment to the United States Constitution?

STATEMENT OF POINTS

I - The trial court committed reversible error in failing to direct an acquittal on all counts on grounds of appellant's insanity.

II - The trial court's comment to the jury upon the testimony of the Government's examining physicians was incomplete and, therefore, inaccurate, denying appellant of a fair and impartial trial.

SUMMARY OF ARGUMENT

Argument I

The trial court committed reversible error in failing to direct a verdict as to each count in the indictment of "Not Guilty, by reason of insanity." The testimony of appellant's examining psychiatrist was clear and unequivocal. He testified that appellant was suffering from a mental disease or defect and that the crimes here were a product of that condition. The usual presumption of sanity was thereby effectively rebutted, and at that point in the proceedings, it became incumbent upon the Government to prove beyond a reasonable doubt that the appellant was not suffering from a mental disease or defect or to prove beyond a reasonable doubt that the crimes here were not a product of that condition. The Government failed to meet this burden. The Government doctors concluded that appellant was not suffering from a mental disease or defect, but the substance of their testimony concerning appellant's behavior pattern expressly and explicitly conceded that appellant's control of his behavior was substantially impaired. This Court has held that it is the behavior itself, not the medical label attached to it, which is the controlling factor. Accordingly, the evidence points to one conclusion: The prosecution failed to meet its burden of proof that appellant was not suffering from a mental disease or defect and, secondly, the prosecution failed to prove beyond a reasonable doubt that the crimes here were not a product of that condition. For this reason, the trial court committed reversible error in failing to direct a

verdict for appellant of "Not guilty by reason of insanity," and the verdict of the court below should, therefore, be reversed.

Argument II

The trial court committed reversible error during the course of its instructions in conveying to the jury an incomplete and, therefore, inaccurate appraisal of the testimony of the Government's examining physicians. The trial judge commented upon the conclusions of the physicians, which were unfavorable to appellant's defense, but the court failed to comment upon the substance of their testimony, which in contrast was extremely favorable to that defense. It is the substance of such medical testimony and not the conclusions of the physicians which is controlling. The court's comment upon the evidence was, therefore, inaccurate and grossly prejudicial. Accordingly, appellant was denied a fair trial, and for this reason, the judgment must be reversed.

TEXT OF ARGUMENT

I

Failure of Trial Court to Direct a Verdict For Appellant of Not Guilty by Reason of Insanity

The trial judge committed reversible error as a result of his failure to direct on each of the counts charged a verdict

for appellant of "Not guilty by reason of insanity." As for the authority of the trial court to direct this verdict, see Issac v. United States, 109 U.S. App. D.C. 34, 284 F.2d 168 (1960). See also, McDonald v. United States, 114 U.S. App. D.C. 120, 312 F.2d 847 (1962); Cooper v. United States, 94 App. D.C. 343, 218 F.2d 39 (1955); Curley v. United States, 81 U.S. App. D.C. 389, 160 F.2d 299 (1947), cert. den., 331 U.S. 837, 67 S.Ct. 1511, 91 L.Ed. 1850 (1947); Federal Rules Criminal Procedure, Rule 29(a), 18 U.S.C.

The legal test for criminal responsibility in this jurisdiction is whether the accused at the time of commission of the crime suffered from a "mental disease or defect" and whether the crime was a product of that condition. Durham v. United States, 94 App. D.C. 228, 214 F.2d 862, 866 (1954). This Court has expressly defined "mental disease or defect" as, "...any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls. McDonald v. United States, supra at 851.

In the normal course of affairs, the law presumes that a person charged with a crime is mentally sane. This presumption, however, was effectively rebutted here with the introduction of "some evidence" of appellant's mental disability, and the Government was then charged with the affirmative burden of proving beyond a reasonable doubt that appellant was not suffering from a

mental disease or defect at the time of the commission of the crimes, or that, if appellant was suffering from a mental disease or defect, these crimes were not a product of that condition. Davis v. United States, 160 U.S. 469, 486-488, 16 S.Ct. 353, 40 L.Ed. 499 (1895); Issac v. United States, supra; Tatum v. United States, 88 U.S. App. D.C. 386, 389, 190 F.2d 612, 615 (1951); Carter v. United States, 102 U.S. App. D.C. 227, 252 F.2d 608 (1957). Upon the Government's failure to meet this burden, and with the introduction by appellant of evidence sufficient to compel a reasonable juror to entertain a reasonable doubt concerning appellant's mental disability, the trial court should have instructed the jury to render the verdict of "Not guilty by reason of insanity." Issac v. United States, supra.

Turning now to the evidence, appellant's examining psychiatrist, Dr. M. L. Adland, initially rebutted the presumption of appellant's sanity as reflected by the following colloquy, beginning on page 188 of the transcript:

> Q - Now, doctor, if we assume that the allegations of rape and assault of this woman and the robbery of her are true, could you tell us with reasonable medical certainty, which is the language we use in court, whether you believe Mr. Washington was suffering from an irresistable impulse to commit these acts at this time?
>
> A - Yes, I believe that he was suffering from an irresistable impulse.
>
> Q - And did this impulse directly affect his voluntary control?

A - At that point he had no voluntary control.

Q - And was the product of his act, the rape that he committed, the robbery he committed and the assault, directly or proximately caused by this irresistable impulse or mental disease?

A - Yes, it was ... .

With the introduction of this evidence, the Government at that point in the proceeding, was confronted with the burden of proving beyond a reasonable doubt that appellant was not suffering from a mental disease or defect at the time of the commission of the crimes, or that, if appellant was suffering from a mental disease or defect, these crimes were not a product of that condition. This it did not do.

The Government offered the testimony of two examining psychiatrists from St. Elizabeth's Hospital, Dr. David G. Owens and Dr. Wilbur A. Hamman, in an effort to prove appellant's criminal responsibility at the time of the occurrence of these crimes. Both of these phycicians on direct examination by the Government concluded that appellant was not experiencing a mental disease or defect at the time of the commission of the offenses. Neither of these conclusions, however, are supported by the substance of their testimony, and without such support, their conclusions become meaningless.

For example, Dr. Owens began by stating that appellant was not suffering from a mental disease or defect. (Tr. p. 240).

Surprisingly, he even refused to concede that appellant had a "personality defect." The substance of his testimony, however, is inconsistent with these conclusions:

(Tr. p. 250) A - . . . I would prefer to say he has personality problems, that is a difficulty in getting along or adjusting, that probably the difficulties that he experiences in relating adequately to other people are more severe or more extreme than the average person has.

* * * * *

(Tr. p. 256) Q - Now, doctor, let us assume that on the date in question in the indictment, Mr. Washington did rape the complaining witness. Based upon your examination, can you give us any insight into the dynamics of his behavior?

A - The only thing that I could do was certainly as I indicated, it would be impossible to give the real dynamics of the case without intensive psycho-therapy. But I can only say from my experience as a psychiatrist and in understanding and studying the behavior of individuals, that, assuming what you say to be correct, this was an individual that wanted to have sexual relations and did not want to postpone gratification of his own desires at the expense of another individual, that is, very little concern for another individual's welfare. (Underlining added.)

* * * * *

(Tr. p. 250) Q - What type of personality do you think he has?

A - My opinion would be that he was generally or would generally be described as somewhat schizoid, that is, he has difficulty relating to people.

He gets angry if he does not have his way. He tends to spend his time alone, or has difficulty relating to people with some aggression when he

does not--<u>when things do not go exactly his way, he acts out in an aggressive manner</u>. (Underlining added.)

* * * * *

(Tr., beginning on p. 260)

A - . . . In addition, he (appellant) indicated there had been a number of rapes that he had been involved in, some he had been arrested for and some he had not been arrested for.

Q - Would you say this was a pattern of behavior, doctor?

A - Well, the rapes did not follow what we speak of as a pattern, that is, where they occur every so often. They occurred when he was usually with another group of three or four men and wanted sexual relations, usually after a few drinks, and would want sexual relations and they would just force a woman into their company and then have relations with her.

It was not a pattern that repeats itself at a specific time. It was a pattern that repeated itself, but only when the patient, along with a group of men, by force, engaged in relations, usually after they had had a few drinks.

Q - Doctor, in this history, didn't he describe an impulse to have relations "<u>come what may</u>"?

A - At this point, I am sure that he did, I am sure that he had an impulse at the point that you would decide that you are going to force a woman to engage in sexual relations with you, you have got the impulse, it is there. So, I am sure whether he described it or not, <u>he did have it. He and the group all had the</u> impulse.

Q - Now, doctor, my question is, is it not your opinion that this impulse to rape affected his voluntary controls of behavior?

A - No, I do not think. I think it was not impulse to rape. <u>It was an impulse to have sexual relations with a lady and if she did not agree with it, why, they forced her</u> . . . (Underlining added.)

In summary, Dr. Owens' testimony explicitly concedes that appellant had an "impulse" to have sexual relations "come what may." If a woman refused, then in Dr. Owens' opinion, appellant would "force" her. This testimony obviously reflects appellant suffered from an irresistable impulse to commit "rape," and under the facts of the case, can point to no other conclusion but that the crimes with which appellant was charged arose out of, and were a product of, that impulse. Yet, strangely, oddly, and interestingly enough, Dr. Owens refused to conclude that appellant suffered from a mental defect or disease. The detailed description of appellant's bizarre behavioral pattern renders this conclusion completely and totally meaningless.

The same evidentiary result must be reached when evaluating the testimony given by Dr. Wilbur A. Hamman, the Government's second examining psychiatrist:

(Tr. p. 282)

Q - Could you tell us in psycho-dynamic terms how you analyze Mr. Washington's personality?

A - I think he is an individual, it is my opinion that he is an individual who does have impulses. He does have drives. Who has very little

regard for the people. And when he wants something, he takes it. (Underlining added.)

Q - He will act out these impulses?

A - Yes.

Q - The impulses, if they are strong, he will act strongly?

A - Yes.

* * * * *

(Tr., beginning on p. 284)

Q - Do there come times in your analysis of Mr. Washington's behavior that he is forced to act by strong impulses?

A - He acts out his impulses, yes.

Q - He acts out?

A - Yes.

Q - And he acts out his sexual impulses, is not that correct?

A - Yes.

Q - Doctor, when he acts out these impulses, doesn't this negate his voluntary controls of these impulses?

A - I do not think that Mr. Washington has much control.

Q - That is my point, doctor, He does not have much control, does he?

A - No.

Q - What?

A - No, he does not. (Underlining added.)

(Tr. p. 287) Q - Do you mean--what you mean is that he does not have any brakes, things that stop him from doing antisocial acts?

A - That is correct.

Q - Isn't this almost irresistable, this antisocial act when he is in this situation with the urge?

A - Not from the way I understand irresistable impulse. An irresistable impulse means to me that there is a conflict and the unwanted behavior breaks through. I do not think there is a conflict in Mr. Washington.

Q - But, without the theory of conflict, without the conflict, isn't it a fact that he is in the situation with the urge for sexual contact, he cannot stop.

A. Well, he will just do it. He has no desire to stop.

Q - He has no power to stop?

A - That is correct. (Underlining added.)

* * * * *

(Tr., beginning on P. 290)

Q - Therefore, if, on the date and time as set forth in the indictment, Washington robbed, Washington raped, Washington assaulted, this was caused by his personality defect, right?

A - This was caused by his personality pattern.

Q - Pattern. Problem. This is a question of degree is it not, doctor?

A - In some manner, to some extent, yes.

* * * * *

(Tr. p. 291) Q - Doctor, based upon the history of this man and his psychiatric history, wouldn't you say that it is medically almost certain that he would repeat aggressive acts in his present condition?

A - Medically almost certain?

Q - Yes, psychiatrically almost certain that he would continue this aggressive pattern?

A - If you consider psychiatry as a discipline which studies all human behavior, I think it would be fair or a fair assumption to predict that this behavior will continue, yes. (Underlining added).

* * * * *

Again, the Government's second examining psychiatrist, Dr. Hamman, refused to conclude that appellant had an irresistable impulse for sexual experience and suffered from a mental disease or defect. Dr. Hamman refused to make this conclusion despite the fact that he expressly testified that appellant has "impulses," that he will "act out of these impulses," that he will act "strongly," that he has "little regard for people and when he wants something, he takes it," that he has no "control," that he has no "brakes" to stop, that he has no "power to stop," that this is caused by his "personality pattern" and that "he will continue this aggressive pattern."

It is submitted that under the criteria established by this Court, "mental defect" and "mental disease" are characterized by and equated with such a behavioral pattern. In McDonald v.

United States, supra, at 851, it was expressly held that a mental disease or defect includes, ". . . any abnormal condition of the mind which substantially impairs behavior controls.

The testimony of Dr. Adland, appellant's examining psychiatrist, is clear and unequivocal. As indicated earlier, he concluded expressly that appellant was suffering from a mental disease or defect and that the crimes with which he was charged were a product of that condition. (Transcript, pages 188, 222). Dr. Adland stated that appellant was "seriously ill," that appellant was a "sick man," that appellant had been sick since he was "eight years old," that appellant was not "responsible" for his actions, that appellant "cannot control himself," that appellant is a "sex maniac" and that appellant was suffering from this "condition" on the night of these crimes. (Transcript, pages 187-188, 203-204, 219).

The substantive evidence, that of both appellant's and the Government's examining physicians, clearly reflects that appellant's behavior controls were more than substantially impaired and indicate that the crimes with which he was accused were a result of that impairment. More significant, however, even at the very minimum, the evidence of the Government's examining physicians was not sufficient to meet the Government's burden of proving beyond a reasonable doubt either (1) that appellant was not suffering from a mental disease or defect, and (2) that his acts

were not the product of his affliction. See, Carter v. United States, supra, at 615.

The testimony of the Government's physicians attach a technical medical label to appellant's behavior. It has been pointed out that the "substance" of their testimony, however, describes a notorious and bizarre pattern of behavior which is totally contradictory and inconsistent with that label. When the "labels" are removed, the testimony of all three physicians indicates that appellant's behavioral controls were substantially impaired. Conclusionary medical labels and terminology are only incidental, and it is the behavior itself or the description of it which is the controlling factor in such circumstances. This Court has expressly so stated: "Neither the Court nor the jury is bound by ad hoc definitions or conclusions as to what experts state is a disease or defect." McDonald v. United States, supra, at 851. In Carter v. United States, supra, at 617, this Court stated in connection with this very question:

> The chief value of an expert's testimony in this field, as in all other fields, rests upon the material from which his opinion is fashioned and the reasoning by which he progresses from his material to his conclusion; in the explanation of the disease and its dynamics, that is how it occurred, developed and affected the mental and emotional processes of the defendant; it does not lie in his mere expression of conclusion.

To hold otherwise would in the most classic sense place form over substance. The fundamental concepts of justice and

"due process" demand no less. Mental sanity or insanity is not a condition which can be determined with precise mathematical certainty. Dr. Hamman, the prosecution's psychiatrist, conceded the obvious in stating, ". . . We cannot measure the degree like you measure a wall with a ruler. . . ." (Transcript, p. 291). Surely, any doubt or uncertainty in this respect must be resolved in favor of the appellant.

In conclusion, therefore, the substantive evidence of the Government does not prove beyond a reasonable doubt that appellant did not suffer from a mental disease or defect, nor does it prove beyond a reasonable doubt that the crimes with which appellant was accused were not a product of this mental disease or defect. Accordingly, the judgment must be reversed with an instruction to the court below to enter a judgment as to each count charged of "Not guilty by reason of insanity."

II

Prejudicial Comment of Trial Court On the Evidence

The trial court committed reversible error during the course of its instructions in conveying to the jury an incomplete and misleading appraisal of the testimony of the Government's two examining psychiatrists. The trial judge in commenting upon their testimony stated:

> Dr. Owens and Dr. Hamman expressed the opinion that the defendant was not at the time of the alleged offenses suffering from any mental disease or defect. (Transcript, page 389)

The comment is accurate as far as it goes. However, it does not go far enough. The comment is objectionable in that it focuses upon an isolated portion of the doctors' testimony which was unfavorable to appellant's defense of insanity and completely excludes other portions of that testimony which was extremely favorable to this defense. See, Cooper v. United States, supra. The instruction failed to reflect that Dr. Owens testified that appellant had an "impulse" to have sexual relations "come what may" and that he would use "force" to achieve this objective. (Transcript, page 260). The instruction failed to reflect that Dr. Hamman testified that appellant has "impulses," that he will "act out of these impulses," that he will act "strongly," that he has "little regard for people and when he wants something he takes it," that he has no "control" that he has no "brakes" to stop, that he has no "power to stop," that this is caused by his "personality pattern," and that he "will continue this aggressive pattern." (Transcript, pages 282, 284, 287, 288, 291). This testimony was crucial. It went to the very heart of the question of insanity. It is the "behavior" of appellant, not the medical label attached to it by the witnesses which is controlling. For as this Court stated in McDonald v. United States, supra, at 851: "Our purpose

now is to make it very clear that neither the courts nor the jury are bound by ad hoc definitions or conclusions as to what experts state is a disease or defect. . . . Thus the jury would consider testimony concerning the development, adaptation and functioning of these processes, and controls." Again, this Court expressly stated in Carter v. United States, supra, at 618:

> A trial judge faced with a defense of insanity in a criminal case ought not attempt to be brief or dogmatic. He ought to explain -- not just state by note but explain -- the applicable rules of law and the duties of the jury in respect to the matter.

A trial judge in the federal courts may comment upon the evidence, but this right is not without limitation. Belleci v. United States, 87 U.S. App. D.C. 274, 283, 184 F.2d 394, 403 (C.A.D.C. 1950). When a trial court chooses to comment upon the crucial testimony of witnesses, any concept of fairness would dictate that the comment include all relevant portions of that testimony.

The court properly instructed to the jury during the course of its charge that the medical conclusions of the doctors should not be binding, and they "also . . . may" consider the defendant's conduct. That does not cure the defect, however. The court committed error in choosing to summarize the doctors' conclusions without summarizing the contradictory substance of their testimony.

> The influence of the trial judge on the jury 'is necessarily and properly of great weight' and 'his slightest word or intimation is received with deference, and may prove controlling.' Quercia v. United States, 289 U.S. 466, 77 L.Ed. 1321, 1325 (1933).

The trial judge's comment is particularly vulnerable because it amounted in effect to an expression of his opinion upon the ultimate issue to be proved. This court recently expressly held in Cooper v. United States, supra, at 277:

> A trial judge must exercise great care when he summarizes specific evidence in the case for the jury, and even greater care is required if he chooses to go further and instruct the jury on the legal consequences of specific evidence.

Under facts somewhat similar to those of the instant case, this court in Polisnik v. United States, 104 U.S. App. D.C. 136, 259 F.2d 951, 953 (C.A.D.C. 1958), held, in reversing the trial judge:

> Though the court said that the resolution of factual questions was for the jury we cannot escape the conviction that the jury might well have been influenced by the court's comments on the evidence; and since those comments tended forceably to deprive appellant of an impartial consideration of the evidence in an important respect we shall reverse and grant a new trial.

In conclusion, the instruction failed to convey the full meaning of the crucial testimony of the doctors. It focused upon a non-controlling rather than a controlling element. The instruction was incomplete and therefore inaccurate, misleading, and

prejudicial. As a result, therefore, appellant was denied a fair trial as required by the Sixth Amendment to the United States Constitution. For this reason, the judgment of the trial court must be reversed.

CONCLUSION

For the reasons set forth in Argument I, it is respectfully requested that this Court vacate and set aside the judgment entered by the United States District Court for the District of Columbia and remand this case to the District Court with instructions to that court to direct a verdict for appellant of "Not guilty by reason of insanity." In the alternative, it is respectfully requested for the reasons set forth in Argument II, that this Court vacate and set aside the judgment entered by the District Court and remand the case to that court with instructions for a new trial.

Respectfully submitted,

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September 29, 1966.

CERTIFICATE OF SERVICE

I, Wade H. Hargrove, hereby certify that on this 29th day of September, 1966, I hand delivered true copies of the foregoing "Brief For Appellant" to:

Frank Q. Nebeker, Esq.
Assistant United States Attorney
United States Courthouse
Washington, D. C.

/s/ Wade H. Hargrove

Wade H. Hargrove

UNITED STATES COURT OF APPEALS

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REPLY BRIEF FOR APPELLANT

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REPLY BRIEF FOR APPELLANT

SUMMARY OF REPLY ARGUMENT

Summary of Reply to Opposition to Appellant's Argument I

Although the medical conclusions of the physicians relating to appellant's insanity were in dispute, the substance of their testimony was not, and since the substantive testimony is controlling, the trial court committed reversible error in its failure to direct a judgment in favor of appellant of "Not guilty by reason of insanity."

Summary of Reply to Opposition to Appellant's Argument II

Upon an attempt to summarize the conclusionary testimony of the Government's physicians which was unfavorable to appellant, the trial judge committed prejudicial error in failing to summarize the substantive portion of their testimony which was favorable to

appellant's defense of insanity, particularly in light of the fact that it is the substantive, rather than the conclusionary testimony which is controlling in such cases.

TEXT OF REPLY ARGUMENT

Reply to Opposition to Appellant's Argument I

The thrust of appellee's opposition argument is that since the medical "conclusions" of the examining psychiatrists were in conflict, the issue of appellant's sanity was one properly submitted for a determination by the jury. With this assertion, it becomes apparent that appellee has failed to perceive the crux of appellant's argument on the insanity issue.

Appellant readily concedes that the "conclusions" of the experts were in conflict. And, if "medical conclusions" in such cases were the determinative factor, then, in light of the conflicting conclusions here, the insanity issue was quite correctly and appropriately submitted for resolution by the jury.

However, as appellant pointed out in his brief, this Court has repeatedly stated that it is not the "conclusions" of expert witnesses, rather it is the "substance" of their testimony, (i.e., the description of the behavior itself here) which is the controlling factor in such cases. McDonald v. United States, 114 U.S. App. D.C. 120, 312 F.2d 847,851 (1962); Carter v. United States, 102 U.S. App. D.C. 386, 190 F.2d 612, 617 (1951).

On this latter point, the testimony of the three physicians was not in dispute. As appellant's brief pointed out with numerous quotations from the record, the descriptions given by all three physicians of appellant's pattern of behavior were in complete agreement. In short, and as one of the Government psychiatrists expressly testified, appellant had no "brakes" or "power" to stop him from committing rape and the evidence reflects clearly that the crimes charged here were a product of that condition. (See Tr. p. 287).

It is submitted that the facts of this case present this Court with the opportunity to settle once and for all the proper role of labels and conclusions in insanity cases. Stripped of multi-syllable and incomprehensibly subtle medical labels, the evidence points to no other conclusion but that appellant's behavior controls were substantially impaired, and appellant was, therefore, suffering from a mental disease or defect. See, McDonald v. United States, supra. Accordingly, the trial court committed reversible error in its failure to direct a judgment in favor of appellant of "Not guilty, by reason of insanity." Cf: Issac v. United States, 109 U.S. App. D.C. 34, 284 F.2d 168 (1960); Durham v. United States, 94 U.S. App. D.C. 228, 214 F.2d 862 (1954).

Reply to Opposition to
Appellant's Argument II

Appellee argues that the trial judge had no duty upon summarizing that portion of the testimony by the Government's

psychiatrists which was unfavorable to appellant's defense of insanity to, in turn, summarize that portion of their testimony which was favorable to that defense.

The extent of the difficult task of the trial judge in this area is fully appreciated by appellant. However, the critical question is simply one of fairness -- fairness in light of all the evidence. The error in the trial court's charge to the jury here is found, not in its assertions, but rather in its omissions. Upon the trial court's effort to summarize the "conclusions" of the Government's physicians, any concept of fairness would certainly require that the trial court summarize, or at the very minimum, comment upon the "substance" of their testimony which was explicitly contradictory. This substantive testimony which described appellant's bizarre pattern of behavior cannot be dismissed as minimal. Rather, it was lengthy and substantial and was crucial to the insanity issue. Ironically enough, it is the substantive description of appellant's pattern of behavior which is controlling on the issue of insanity and not the mere medical labels or conclusions attached to it. McDonald v. United States, supra; Carter v. United States, supra. As pointed out in appellant's brief, the pattern of behavior described by the Government's two physicians was extremely favorable to appellant's defense of insanity.

The omissions of the trial court's charge in this respect were patently prejudicial. Accordingly, the judgment should be

reversed and remanded to the court below with appropriate instructions for a new trial.

CONCLUSION

For the reasons set forth in Argument I of appellant's brief, it is respectfully requested that this Court vacate and set aside the judgment entered by the United States District Court for the District of Columbia and remand this case to the District Court with instructions to that court to direct a verdict for appellant of "Not guilty, by reason of insanity." In the alternative, it is respectfully requested for the reasons set forth in Argument II of appellant's brief, that this court vacate and set aside the judgment entered by the District Court and remand the case to that court with appropriate instructions for a new trial.

Respectfully submitted,

/s/ Frank U. Fletcher

FRANK U. FLETCHER

Attorney for Appellant
Appointed by this Court

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November 8, 1966.

CERTIFICATE OF SERVICE

I, Wade H. Hargrove, hereby certify that on this 8th day of November, 1966, I hand delivered true copies of the foregoing "Reply Brief For Appellant" to:

Frank Q. Nebeker, Esq.
Assistant United States Attorney
United States Court House
Washington, D. C.

/s/ Wade H. Hargrove

Wade H. Hargrove

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,232

THOMAS H. WASHINGTON, JR., APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
JOEL D. BLACKWELL,
EDWARD T. MILLER,
Assistant United States Attorneys.

Cr. No. 950-65

QUESTIONS PRESENTED

In the opinion of appellee, the following questions are presented:

1. Since the government's psychiatrists explicitly denied that appellant was suffering from a mental disease or defect at the time of the offense charged, in direct contradiction to the opinion of the defense psychiatrist, did the trial judge err by not entering a judgment of acquittal by reason of insanity?

2. In noting by an unelaborated comment made during the insanity charge simply that the prosecution's psychiatrists had found appellant to be without mental disease or defect at the time of the offense charged, did the trial court make a deficient and prejudicial summary of the evidence which requires reversal in this case, even though the comment was incontestibly supported in the record.

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TABLE OF CASES

*Cases chiefly relied upon are marked by asterisks.

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

After a three-day trial to a jury before Judge Burnita Shelton Matthews appellant Thomas H. Washington, Jr. was convicted February 18, 1966 on a three count indictment filed August 23, 1965 which charged him with rape (22 D.C. Code § 2801), robbery (22 D.C. Code § 2901), and assault with a deadly weapon (22 D.C. Code § 502). Appellant was sentenced to five to fifteen years imprisonment on the first count charging rape, and concurrent sentences of three to ten years on the second and third counts to be served consecutively to the sentence imposed

on the first count. From this conviction, appellant takes the instant appeal.

Because the primary defense was that of insanity, the following chronology is also relevant. After his arrest, appellant's motion for a mental examination was granted on September 23 and he was ordered committed to St. Elizabeths Hospital for sixty days. By letter dated November 18, 1965 from Dale C. Cameron, Superintendent of that Hospital, the trial court was advised that appellant after examination was found to be without mental disease or defect and to be competent to stand trial. An appropriate order finding appellant mentally competent to stand trial was filed without opposition on December 1. On January 28, 1966 appellant's motion for screening by the Legal Psychiatric Service was heard and denied.

The instant appeal is concerned with whether the evidence of insanity was appropriate for submission to the jury and with the propriety of a portion of the trial court's charge which made reference to the rebuttal testimony of the government psychiatrists. It is thus unnecessary, in appellee's opinion, to precis the evidence of the offenses in great detail. The record shows, however, that at about three in the morning of August 9, 1965 as Mrs. Gladys Harrell was returning home, she was accosted by appellant, a stranger, whom she identified in court (Tr. 3, 5, 67). He grabbed her around the throat, and when she screamed, gagged her and threatened to cut her throat with the knife he had pointed at her throat and on which she cut her finger when she tried to force his arm from her neck. (Tr. 3, 5-9, 24, 43-45, 50, 54-55). He dragged her to a nearby garage where he raped her and robbed her of twenty-four dollars (Tr. 9, 11-13, 61). He was caught in the act, however, by police officers who entered the garage and found him on the complainant and recovered the open hawk-billed knife from beneath the car (Tr. 13-14, 57-59, 61-62, 84-85, 88, 105).

Through Dr. Marvin L. Adland, a practicing psychiatrist for twenty-one years, appellant introduced evidence

of insanity at the time of the offenses with which he was charged (Tr. 176-77). Dr. Adland testified that when he examined appellant at the D.C. Jail on January 14, he had concluded that appellant was "suffering from a severe chronic, unchanging character disorder . . . classified . . . as a passive-aggressive personality disorder" (Tr. 178-80, 215-16). Noting that psychotic behavior was not an inherent characteristic of the personality disorder, which he termed a mental illness, and that appellant had given "no evidence whatever of being psychotic," Dr. Adland described as relevant to appellant's condition the "lack of anxiety, the indifference to the way they are and the way they live" which characterize persons afflicted with such passive-aggressive personality disorders (Tr. 181-82, 184, 212). He noted appellant's lack of "affect" or "feeling" appropriate to his situation and a lack of "judgment" in that he could not find anything wrong in the incidents in his life "that were outside the social codes of the society in which he lived." But at the same time the doctor found appellant oriented and within reality except for these defects of feeling and judgment (Tr. 184-86, 209). He observed also a recognition by appellant "that he finds it impossible to control the impulse . . . to rape." (Tr. 186, 209, 219). Dr. Adland stated his conclusion that at the time of the charged offense appellant "was suffering from an irresistible impulse" and at that time "had no voluntary control," and that the rape, robbery, and assault were caused by or were the product of this irresistible impulse or long term, mental disease or illness (Tr. 186, 188, 216, 219).

The two psychiatrists who testified in rebuttal for the government, however, disagreed with Dr. Adland. Dr. David J. Owens, clinical director in charge of the maximum security unit at St. Elizabeths Hospital, testified that in his opinion, based on the records and other sources of information available to him, appellant was not suffering from any mental illness, disease or defect on the date of the offense (Tr. 240, 243, 249-50, 272). He testified that his psychological findings were "suggestive of an

individual of general intellectual ability, with little feeling for or ability to relate to others and some sociopathic symptomology" (Tr. 250, 263, 273). Dr. Owens specifically disagreed with Dr. Adland's conclusions that appellant was suffering from a passive-aggressive personality and that he had suffered an irresistible impulse at the time of the offense (Tr. 244, 246-47, 262). Rather he saw appellant's problem simply as an unwillingness to postpone gratification of his sexual desires (Tr. 256, 260-62).

Dr. Wilbur A. Hammann, a staff psychiatrists assigned to the maximum security section of St. Elizabeths Hospital, also disagreed with Dr. Adland's conclusions and testified that appellant was not mentally ill, that he did not suffer from a passive-aggressive personality and that he had not experienced an irresistible impulse in connection with the offenses charged (Tr. 279-80, 287-89, 293-95).[1] He described appellant as a very aggressive, anti-

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[1] Appellant is particularly concerned with the substance of Dr. Hammann's testimony which he contends gives support to his theory that appellant was subject to an irresistible impulse despite the doctor's explicit conclusion that appellant was without mental illness. The following relevant dialogue is reproduced, therefore, in order to avoid a possible misinterpretation:

BY MR. SANDGROUND:

Q Is it difficult for Mr. Washington to resist a strong sexual impulse based upon his sexual history and based upon this history of what has gone on in his life to him, leading him to the present time.

. . .

[Dr. Hammann]

A Difficulty to me means conflict. In a neurosis, in a character neurosis and a personality disorder there is conflict between the part of the person that says, "Don't" and the person that says "Does." I do not think he has any conflicts. So, I do not think there is much difficulty. He just does not.

Q Do you mean—what you mean is that he does not have any brakes, things that stop him from doing antisocial acts?

A That is correct.

Q Isn't this almost irresistible, this antisocial act when he is in this situation with the urge?

A Not from the way I understand irresistible impulse. An

social individual, with some schizoid traits, but not a sociopath; a man whose acts were caused by his personality pattern, as opposed to personality disorder, who had little control over himself and was without conflicts of the type associated with neurosis or other psychiatric disorder; and a man inclined to have little regard for other people and simply to take what he wanted when he wanted it (Tr. 282, 284-85, 287-95).

Appellant's motion for a judgment of acquittal by reason of insanity which is one subject of this appeal was denied; appropriate instructions, including full and detailed instructions regarding appellant's defense of insanity were given; and the case was submitted to the jury.

SUMMARY OF ARGUMENT

I

The record shows an obvious and explicit confiict between the opinions of the defense psychiatrist and the two psychiatrists who testified in rebuttal for the prosecution. The former testified that appellant was suffering from a serious and chronic mental illness at the time of the offenses with which he was charged, and that the

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irrestible impulse means to me that there is a conflict and the unwanted behavior breaks through. I do not think there is conflict in Mr. Washington.

Q But, without the theory of conflict, without the conflict, isn't it a fact that he is in the situation with the urge for sexual contact, he cannot stop.

A Well, he will just do it. He has no desire to stop.

Q He has no power to stop?

A That is correct.

Q And, doctor, isn't it a fact that he has no power to stop an irresistible impulse?

A Not as I understand it.

Q And you understand it from a legal terminology?

A I understand it both from legal terminology and from a psychiatric terminology. (Tr. 287-89.)

offenses were the product of that illness. The latter testified that appellant was not suffering from mental disease or defect. The issue was therefore for the jury as a matter of settled law, regardless of appellant's contention that the substance of the government's doctors' testimony supported appellant's theory of defense rather than the doctors' conclusion.

II

Even if the trial judge's comment made during the insanity charge that the government psychiatrists had concluded that appellant was without mental disease or defect was a summary of evidence, it was not in any way defective for it was incontestibly supported by the record and merely stated a truism. In any event appellant had ample opportunity to argue his debatable theory that the substance of the government's doctors' testimony supported the defense even if their stated conclusions did not. But even if the comment was in some way erroneous, its obviously limited purpose and limited potential for harm is manifest from its placement in the context of the charge itself within the framework of which as well as that of the evidence and the arguments of counsel it must be considered when assessing possible prejudice on appellate review.

ARGUMENT

I. The jury, not the trial judge, was the proper arbiter of the conflicting expert opinion relating to appellant's defense of insanity.

(Tr. 176-88, 209, 212, 215-16, 219, 240, 243-44, 246-47, 249-50, 256, 260-63, 272-73, 279-95)

Whether the rationale and substance of Dr. Hamman's testimony supported his own stated conclusion that appellant was without mental disease or defect or appellant's irresistible impulse theory of his insanity defense, as appellant urges, the clear disagreement between the stated

conclusions of Drs. Hamman and Owens for the government on the one hand, and Dr. Adland, for appellant, on the other, put the evidence relating to appellant's alleged insanity in the precise posture, the classic situation, which calls for submission of the issue of appellant's insanity to the jury.[2] *Keys* v. *United States*, 120 U.S. App. D.C. 343, 346 F.2d 824, *cert. denied*, 382 U.S. 869 (1965); *McDonald* v. *United States*, 114 U.S. App. D.C. 120, 312 F.2d 847 (1962). Appellant's contention that it was error for the trial judge not to grant his motion for a judgment of acquittal is thus without support of law and is patently devoid of merit.[3]

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[2] As the counterstatement of the case shows in greater detail, Dr. Hammann like Dr. Owens, found no mental disease or defect and no psychological conflict which would permit diagnosis of an irresistible impulse. Both government doctors, however, found the pattern of appellant's personality to be characterized by little regard for others and little control over himself. (Tr. 240, 243-44, 246-47, 249-50, 256, 260-63, 272-73, 279-95). Dr. Adland, on the other hand, found serious chronic mental illness and indications that at the time of the offense appellant had suffered from an irresistible impulse to rape (Tr. 176-88, 209, 212, 215-16, 219).

[3] Assessing the weight and credibility to be attributed to the conflicting expert testimony in such a case as this is the responsibility of the jury into whose hands rather than those of judges and psychiatrists the issue of mental illness is appropriately placed. See *McDonald* v. *United States*, *supra*. The jury's determination is of "responsibility, not a clinical evaluation of disease." See *Rollerson* v. *United States*, 119 U.S. App. D.C. 400, 402, 343 F.2d 269, 271 (1964). The jury is "free to believe any reasonable "estimate" even though different or contrary views may also be reasonable." *Naples* v. *United States*, 120 U.S. App. D.C. 123, 130, 344 F.2d 508, 515 (1964). The government, of course, need not even always meet an insanity defense with testimony from its own witnesses in order to sustain its relevant burden of proof. E.g. *Hawkins* v. *United States*, 114 U.S. App. D.C. 44, 310 F.2d 849 (1962).

II. The trial court's unelaborated statement during the insanity charge that two government psychiatrists had found appellant free of mental disease or defect at the time of the offense was not error.

(Tr. 238, 240, 243, 248, 262, 272-74, 279-80, 287-89, 293-94, 330, 333-36, 380-98)

The second half of the trial judge's meticulous charge, delivered after a short recess to refresh the jury, dealt exclusively with appellant's defense (Tr. 380-94, 397-98). Appellant discovers prejudice in a brief remark, extracted from context, which merely recognized the obvious, that the conclusions of the government's two psychiatric experts differed from appellant's expert's. This allegedly opprobrious statement consisted of the following: "On the other hand, Dr. Owens and Dr. Hamman expressed the opinion that the defendant was not at the time of the alleged offenses suffering from any mental disease or defect." (Tr. 389.) Appellant's contention, more or less similar to that made at trial, is that the statement "focuses upon an isolated portion of the doctors' testimony which was unfavorable to appellant's defense of insanity and completely excludes other portions of that testimony which was extremely favorable to this defense." (Brief of Appellant, p. 18; Tr. 394-96.)

Even if the remark were in some way erroneous, as he suggests, a number of relevant factors militate against the possibility of prejudice.[4] Any possible adverse effect

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[4] The immediately pertinent portion of the lengthy insanity charge was given as follows:

> Also, the jury, in weighing and evaluating the testimony of each expert, may consider all the factors relied upon by the expert, in reaching his expert opinion.
>
> The witnesses, who appeared in this case, who are members of the medical profession specializing in psychiatry, were Dr. Adland who testified for the defendant and Drs. Owens and Hamman who testified for the United States.
>
> Dr. Adland said, according to my recollection, but you of course are to go by your own recollection if it differs from mine in any way, but going back to Dr. Adland, my recollection is that he said that in his opinion Mr. Washington is suffer-

which might derive from the comment, if indeed its brevity and ambience make it a summary of the evidence at all, must be judged even if erroneous not only within the framework of the charge taken as a whole but "in the setting created by the jury's hearing of the evidence and the summations of counsel." *United States* v. *Kahaner*, 317 F.2d 459, 479 (2d Cir.), *cert. denied*, 375 U.S. 836 (1963); *Redfield* v. *United States*, 117 U.S. App. D.C. 231, 328 F.2d 532 (1964); *Carey* v. *United States*, 111 U.S. App. D.C. 300, 296 F.2d 422 (1961).[5] The judge's

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ing from a severe chronic, unchanging character disorder, which he further described as a passive-aggressive personality disorder. He said that what he thus described is a mental disease and that the defendant's acts on August 9th were, in his opinion, the product of the mental disease which he described. He also said, according to my recollection, that the defendant had an irresistible impulse to commit rape and that such irresistible impulse was the product of the mental disease from which he said the defendant suffers.

On the other hand, Dr. Owens and Dr. Hammann expressed the opinion that the defendant was not at the time of the alleged offenses suffering from any mental disease or defect.

While you should consider the opinions of the expert witnesses, you are told that you are not bound to follow the conclusion of any one or all of them because, in the final analysis, the issue of sanity or insanity, like all the other issues of fact in this case, is to be determined by the jury.

[One short paragraph is omitted]

In this connection, you are instructed that you are not bound by medical labels, definitions or conclusions, as to what experts state is a mental disease or defect. What psychiatrists may consider a mental disease or defect for clinical purposes, where their concern is treatment, may or may not be the same as mental disease or defect for your purpose in determining criminal responsibility. Whether the defendant had a mental disease or defect is for you, the jury, to determine, and resolution of that question cannot be controlled by expert opinion. (Tr. 388-90.) [Emphasis supplied.]

[5] In an analogous situation, an unfavorable comment by a trial judge which went so far as to point out the total absence from the record of evidence in support of a crucial defense allegation has been held to be "well within the permitted area of comment." See *Burgman* v. *United States*, 88 U.S. App. D.C. 184, 187-88, 188 F.2d 637, 640-41, *cert. denied*, 342 U.S. 838 (1951).

observation finds clear support in the record (Tr. 238, 240, 243, 248-50, 262, 272-74, 279-80, 287-89, 293-94). Appellant concedes as much in his brief (Brief for Appellant, p. 18).

In addition, its potential adverse effect, if any, was inevitably limited by its placement between explicit admonitions by the trial judge that all factors relied upon by the experts were appropriate for the jury's consideration and that the opinions and conclusions of the experts were not binding upon them (Tr. 386-88). The judge's appropriately reticent approach to the sometimes risky but entirely discretionary venture of summarizing the evidence, was demonstrated not only by her advice to the jury that she sought to avoid making a summary of the evidence, but by her emphasis on the instruction that the jury's recollection, in any event, not hers, was to govern its consideration of the testimony (Tr. 388, 398). See *United States* v. *Kahaner*, *supra* at 479, n.12; *Roberts* v. *United States*, 109 U.S. App. D.C. 75, 284 F.2d 209 (1960), *cert. denied*, 368 U.S. 863 (1961); *United States* v. *Cohen*, 145 F.2d 82, 92 (2d Cir. 1944), *cert. denied*, 323 U.S. 799 (1945); *cf. Cooper* v. *United States*, —— U.S. App. D.C. ——, 357 F.2d 274, 277 (1966) (concurring opinion of Bazelon, C.J.). She had, in fact, and without objection on appeal or at trial, noted at other times that the conclusions of the experts had differed, thus rendering the challenged remark merely cumulative (Tr. 387).

Perhaps most important of all, the statement immediately followed a favorable and more elaborate restatement of the defense psychiatrist's conclusions that appellant was in fact suffering from a mental disease. In this context it can hardly have served any but its intended purpose of merely noting the obvious fact that the medical experts' conclusions had differed.

Finally, appellant's trial counsel had ample opportunity to argue his theory that the substance of the government's psychiatrists' testimony supported the defense even if the stated conclusions did not (Tr. 330, 333-36). He was not,

entitled, however, to require the court in effect to argue his case or to adopt his contentions as to the significance or weight of any particular portion of the testimony. See *Lewis* v. *United States*, 295 F.2d 441, 447 (1st Cir.), *cert. denied*, 265 U.S. 594 (1924).

In sum, then, the trial judge in her sound discretion effectively avoided any of the possible pitfalls of summarizing the evidence, appellant's trial counsel had ample opportunity to present his debatable theory to the jury, and the record simply discloses no harmful error in either the remark or the failure to expand it.[6]

CONCLUSION

WHEREFORE, appellee respectfully submits that the judgment of the District Court should be affirmed.

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[6] If the remark is viewed as a summary of evidence as appellant would have it viewed, Judge Friendly's comment is apt: [T]he judge's summary cannot be expected to perform the office of the witnesses and the counsel, and his omission to state a piece of evidence cannot be transmitted into an implied direction to the jury not to consider it when his express direction was the opposite. This is what lies behind the statement in *Allis* v. *United States*, 155 U.S. 117, 124 (1894), "we know of no rule that compels a court to recapitulate all the items of the evidence, even all bearing upon a single question." *United States* v. *Kahaner*, *supra* at 481.

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